United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-2088

United States Court of Appeals

For the Second Circuit.

MEIR KAHANE,

Plaintiff-Petitioner-Appellee,

-against-

NORMAN CARLSON Director of the Federal Bureau of Prisons, LAWRENCE TAYLOR, Warden of the New York Metropolitan Correctional Center, and MATTHEW WALSH, Director of the New York Community Treatment Center,

Defendants-Respondents-Appellants.

On Appeal From The United States District Court For The Eastern District Of New York

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BRIEF FOR THE APPELLEE

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PRELIMINARY STATEMENT

Appellants appeal from a final order of the United States District Court for the Eastern District of New York (Weinstein, J.) granting appellee's motion for an order directing the appellant to provide the appellee with Kosher food during the period of appellee's incarceration.[1]

ISSUES PRESENTED

I. Was the Court below correct in ordering the Federal Authorities to allow Kosher meals to be given to an Orthodox

1. The order (on remand) of the District Court may be found at pages 40 through 46 of the Supplemental Appendix, hereinafter referred to as "SA-." That Order, dated August 21, 1975, reaffirms the District Court's order of May 7, 1975 (SA-45), which is reproduced at page 159 of the Appendix, hereinafter referred to as "A-."

Jewish prisoner during the period of his incarceration?

II. Whether the Bureau of Prisons' policy of not allowing Orthodox Jewish prisoners Kosher "T.V. Dinners" is constitutional and sound? The court below answered in the negative.

STATEMENT OF THE CASE

On July 9, 1971, Appellee plead guilty to a single count of 18 USC §371 ("conspiracy to make, receive and possess an incendiary device") (A-5). As a result of the plea the appellee received a suspended sentence, was placed on probation and a $5,000 fine was levied (A-5). On May 2, 1972, Appellee was found to be in violation of probation at a hearing held before the sentencing judge (A-7). The District Court entered an order further modifying the original terms of the probation and added certain Special Conditions (A-7).

On February 21, 1975, after an adverse indication concerning probationer's conduct made by the Probation Department on February 7, 1975, a hearing was held before the Hon. Jack B. Weinstein wherein the appellee was found in violation of probation. The appellee was sentenced to a term of imprisonment of one year (A-9).

After two stays of the execution of the sentence so that appellee could set certain personal and professional committments in order (A-20), appellee was directed to surrender on March 18, 1975 under an Amended Committment (A-33). A hearing had been held on March 17, 1975 where counsel for appellee outlined the special circumstances of appellee's religious convictions and requirements, i.e. Kashruth and the approaching Passover holiday (A-21-A-32). Specific representations were made by the Assistant United States Attorney in this regard (A-28) and all parties agreed that after the passing of the Passover holiday appellee would be transferred to a suitable institution. (Allenwood was mentioned in this respect — A-26). For the

duration of the Passover period,[2] appellee was to be held at the Community Treatment Center (A-33).

On March 25, 1975, the District Court ordered appellee to the custody of counsel for two separate periods during the Passover for religious reasons (A-34-35). Appellee was to be returned to his place of confinement on April 3, 1975, and was to begin serving his sentence at Allenwood Correctional Facility on April 7, 1975 (A-35).

However, on April 4, 1975, a hearing was held at which time the court was suddenly informed by Appellee's counsel that the Bureau of Prisons would *not* honor the orders of the court[3] requiring Kosher food for the prisoner (A-38). Judge Weinstein, realizing the irreparable harm that might be done to the appellee were he to be required to forego sustenance during the soon-to-ensue litigation (A-40-41) issued a stay of the Amended Order of Committment continuing appellee's presence at the Community Treatment Center so as to preserve the *status quo* (A-44).

On April 14, 1975, counsel filed a motion for an order providing Kosher food to the appellee, along with a supporting memorandum (A-47). A supplemental memorandum was filed on April 16, 1975. The United States Attorney replied by way of a letter addressed to the District Court (A-52-56). The Government questioned the court's jurisdiction to issue the Amended Committment (A-53), outlined the Bureau of Prison Policy (A-56) and questioned the appellee's *bona fides* (A-62).

On April 24, 1975, over the Government's objection to the proceedings, a hearing was held. Witnesses were called and testified, to the requirements of appellee's faith—especially with regard to Kashruth—and how those requirements could not be modified by imprisonment (A-57-100).[4] Testimony concerning

2. Due to the very special dietary regulations during this period of time. This request was *specifically* consented to by the Government (A-35).

3. Up to that time proper is unopposed by the United States Attorney's office.

4. Except upon pain of death.

the case of supplying Kosher meals while incarcerated was also heard (A-100-124). The *bona fides* of appellee's request was clearly outlined for the court (A-125-126, 68-69).

On April 25, 1975, pursuant to the District Court's suggestion at the hearing (A-140) appellee filed an application under 28 USC §2255 seeking to require the Government to provide Kosher food for the appellee during his period of incarceration (A-151-158); a separate docketing fee was paid, and the case was assigned a civil docket number (75-C-624), with the original criminal file (71 Cr 479) marked as a related case.

On May 7, 1975, by Memorandum and Order, the court below granted the relief requested in the §2255 application (A-159-204). The District Court passed on the requirements of appellee's faith, the *bona fides* of appellee's request, and the comparable ease of the Bureau in accomodating appellee's religious needs (A-165-176). Judge Weinstein found that the "compelling interest" test must be applied when considering whether Kosher food was to be provided to Orthodox Jewish federal prisoners (A-191). On June 6, 1975 the Government appealed from this Memorandum and Order (A-205).

On July 31, 1975, appellant moved this Court for a Summary Reversal or, in the alternative, for a Stay Pending Appeal of Judge Weinstein's Order—in light of this Court's decision in *United States v. Huss and Smilow* —— F. 2d ——, Slip Op. 5121 (2d Cir. July 25, 1975).

After argument, on August 12, 1975, this Court remanded the matter back to the District Court for consideration in light of *Huss and Smilow, supra.*

On August 14, 1975, appellee filed two additional civil actions. (SA-17-18). The first, entitled *United States of America ex rel. Meir Kahane v. United States Marshal for the Eastern District of New York and Matthew Walsh, Complex Director, Community Treatment Center* ("*CTC*") (75-C-1343), a petition for a Writ of Habeas Corpus pursuant to 28 USC §2241, and the second, a Summons and Complaint founded under 28 USC

§1361 entitled *Meir Kahane v. Norman Carlson, Director, Bureau of Prisons, and Matthew Walsh, Complex Director, Federal Community Treatment Center* ("*CTC*") (75-C-1334). In both cases proper fees were paid and, in the latter of the two actions, Marshal's service was secured. All parties were represented by the United States Attorney for the Eastern District of New York (SA-36-39).

On that same day (August 14, 1975) a hearing was held (SA-3) before the District Court for reconsideration of the matter (75-C-624) as per this Court's remand. Over the objections of the Government, the District Court deemed the pleadings in 75-C-624 amended to include both 75-C-1334 and 75-C-624 (SA17-18). Appellee moved to add certain defendants,, which motion was granted, over objections (SA-5).[5] The present caption reflects these changes.[6]

The Government objected to jurisdiction of the District Court over the §2241 claim (SA-7), but initially conceded jurisdiction on the §1361 action *vis-a-vis* proper venue under 28 USC §1391(e)(4) (SA-11). By application, this venue concession was subsequently withdrawn (SA24-25).

A second hearing was held on August 21, 1975 (SA-33-39) after which the District Court entered its Order [on remand,] reaffirming the decision of May 7, 1975 (SA40-46).

5. Pursuant to 28 U.S.C. 1653 and Rules 2, 15(b), 15(c), 21, 54(c) and 81(a)(2) of the Federal Rules of Civil Procedure.

6. The addition of the United States Attorney as a defendant in this action was subsequently dropped on consent. (SA-36)

POINT I

UNDER THE CIRCUMSTANCES HEREIN THE CONSTITUTION REQUIRES THE BUREAU OF PRISONS TO PROVIDE KOSHER FOOD FOR ORTHODOX JEWISH PRISONERS DURING THEIR PERIOD OF INCARCERATION.

INTRODUCTION

There is no disagreement between the parties to this action that constitutional freedoms remain protected, even when a citizen is incarcerated in a Federal penal institution, from arbitrary Government incursion. (Appellant's Brief at 11). Nor has the Government ever denied that the religious dietary requirements of an inmate are not of the nature of "inherent individual constitutional rights" to be protected by the courts. Instead the level or extent of such protection is at the heart of this controversey.

A.

THE RIGHT TO EAT KOSHER FOOD WHILE INCARCERATED IS A BASIC FREEDOM PROTECTED BY THE FIRST, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

To eat is truly the most basic of all life's functions. From the earliest, man in his relationship with his fellow men, and with his creator, has preserved a special significance in ritual for food.

The Jew, as part of his religion, believes that the manner of food he eats and the way in which it is prepared satisfies, on a daily basis, a covenant between man and God. Following rules and regulations almost 6,000 years old, the meals of which an Orthodox Jew partakes comply with the tenets of this faith.

Recognizing that any incorrection by Government into the religious practices of its citizens is a violation of basic First Amendment freedoms, Courts have systematically viewed dietary requirements as worthy of constitutional protection. See *Jones v. Butz*, 374 F. Supp. 1284 (SDNY), aff'd 95 S. Ct. 22 (1974) (need to eat Kosher food protected by free exercise clause); *Barnett v. Rodgers*, 419 F.2d 995 (D.C. Cir. 1968) and *Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973) (Black Muslim's have a right to be provided with a pork-free diet while in prison).

Once it has been ascertained that there *is* a right to be protected, courts must determine whether such protection is in fact needed in the situations before them: are the religious rights of the petitioners in jeopardy?

The testimony at the hearing held below was replete with learned opinion on the subject of Kashruth—the body of Jewish dietary law. The first witness called, Rabbi Dr. Moishe Tendler of Yeshiva University testified on direct examination:

> "Q. If Kosher food were not available in a penal institution, what would the religious dictates be upon Rabbi Kahane and his conduct with regard to the partaking of non-Kosher food?
>
> A. If all he had was non-Kosher food to eat, he would have to wait until his physiological state, his vital signs would so be determined by competent medical authorities that he is in danger of dying—then and only then could he partake of [non-Kosher] food." (A-68-69)."

Other witnesses reaffirmed Rabbi Dr. Tendler's testimony—including the court's expert (A-99-100).

The witness went on to enlighten the District Court in the ways of the Kashruth: how milk is never to be eaten with meat, how utensils must be separate as to milk and meat, how pots and pans which had been used for one could not be used for the other; how all animals must be slaughtered ritually, how certain

animals may *never* be eaten, how any item whether stove, spoon, or pot which came in contact with any of these "unclean" animals could not be used to prepare food that could be deemed Kosher. What became clear was that unless some accommodations were made, appellee, upon incarceration, would starve, as his diet would be limited to whole "apple(s) . . . orange(s) . . . and . . . banana(s) not prepared in any way, that is, not cut with a non-Kosher knife." (A-70-71)

The Bureau of Prisons has a stated policy of " . . . extend(ing) to committed offenders the greatest amount of freedom of, and opportunity for pursuing, individual religious reliefs and practices as is consonant with the Bureau of Prisons mission—the correction of the committed offender". (Federal Bureau of Prisons Policy Statement 7300.43B). The Bureau goes on to state that such goals must be accomplished within the limits of maintaining security.

Under the Bureau's present policy, enunciated in 7300.43B, the way the Bureau hopes to accomplish this constitutionally mandated goal is to allow a prisoner to abstain from eating foods which he considers prohibited to him by his religion, substituting in their stead added portions of non-rationed items which are not so offensive. The Bureau feels that the problems of "institutional administration" must remain primary.

But the Bureau itself, ostensibly, realizes that this policy, adequate for, let us say, Black Muslims, who must merely refrain from eating pork, is wholly inoperative as to Orthodox Jews. In *U.S. v. Huss and Smilow*, 72 Cr. 24 and 25 (SDNY, May 5, 1975) *vacated for lack of jurisdiction*, —— F.2d ——, Slip Op. 5121 (2d Cir., July 25, 1975) the Bureau spoke of how it had made special provisions for Jewish prisoners. The Bureau allowed them to work in the commissary to observe how the food was prepared and to draw items off the "medical serving line". Vitamin and mineral supplements were also provided.

While the Government states that this will satisfy the religious and nutritional needs of the Orthodox Jew, such is far from

truth. As testified to at the hearing, even the most "benign" foods e.g. fruits or vegetables may be rendered non-Kosher by improper, unsupervised handling. Even a simple potato could be rendered non-Kosher (A-80). The Orthodox Jew, as he is unsure of even pre-packaged foods, would require that they bear the proper indicia of Kosher preparation; that they were prepared under proper Kashruth supervision.

To whatever effect, the Bureau of Prisons would, therefore, require appellee to spend one year in prison on a diet of whole fruit and tinned fish (Appellant's Brief at 16), while his fellow inmates are eating normal, wholesome and esthetically satisfying meals including meat. The twin denials of humane punishment and equal protection mandate judicial intervention. That the appellee's beliefs are uncommon[7] or that his co-religionists are infrequent guests of the Federal prisons should not operate so as to place him in a Scylla and Charybdis quandry, the likes of which Mrs. Sherbert never imagined (Cf. *Sherbert v. Verner*, 374 US 398 (1963) ✈

> " 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.' *West Virginia State Bd. of Education v. Barnette*, 319 US 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). In this case the Constitution requires that the religious needs of the defendant (appellee) to practice an important tenet of his faith be respected." (A-203)

7. The Jewish religion is conceded to be one of the great organized religions of the world.

B.

THE COURT BELOW APPLIED THE PROPER STANDARD IN ASCERTAINING WHETHER THE BUREAU OF PRISONS SHOULD BE REQUIRED TO PROVIDE KOSHER FOOD TO APPELLEE.

Appellee posits that no matter what test is applied to the facts at hand, the stonewall which the Government has erected as a bar to the provision of Kosher food to this Orthodox Jewish prisoner must fall. No manner of argument, be it based on prison security, ease of administration or financial considerations can satisfy or convince a court cognizant of the very essence of our Constitution that that document will stand mute and allow appellant to require a citizen to choose between starvation and breach of faith. There can be no interest so "justifiable" or "legitimate", "substantial" or "compelling" as to forward its own objectives at such a cost.

The court below (A-189), as well as the Supreme Court, recognizes that certain freedoms, and incidents of such freedoms, are sacrificed by the prisoner due to the nature of the prison situation.

> "We start with the familiar proposition that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system'. *Price v. Johnston,* 334 US 266, 285 (1948). See also *Cruz v. Beto,* 405 US 319, 321 (1972)" *Pell v. Procunier,* 417 US 817 (42 USLW at 4999) (1974).

The prisoner, however, sacrifices only those freedoms which are necessary to his status as a prisoner, and courts must analyze "legitimate penalogical objectives" to determine just what those necessaries are. *Pell v. Procunier,* supra. This is merely a "variation on a theme" of constitutional thinking laid out first in *Sherbet v. Verner,* 374 US 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). The *Sherbert* court stated flatly, that whenever govern-

ment acted so as to substantially infringe on a citizen's First Amendment rights (there, freedom of religious practice) such action would be upheld *only* if it furthered a "compelling state interest" measured by some justification of public safety, health or welfare. Moreover, this "compelling interest" would prove *inadequate* if it could be shown that the administrative problems the change created would be less than completely unworkable. See *Braunfeld v. Brown,* 366 US 599, 81 S.Ct. 1144, 6 L. Ed 2d 563 (1961).

Appellant has voiced concern over what it terms are "widely inconsistent approaches" and "several diverging standards" which have been applied to analyzing prison situations in which First Amendment freedoms are alleged violated (Appellant's Brief at 12). Perhaps it is this concern which causes the Government to read the Supreme Court's decision in *Procunier v. Martinez* [(416 US 396 (1974)] more broadly than the Court itself intended.

> "Our task is to determine the proper standard for deciding whether a particular regulation or practice *relating to inmate correspondence* constitutes an impermissable restraint of First Amendment liberties." *Procunier v. Martinez,* supra. (42 USLW at 4612) (emphasis added)

The Court recognized that each situation in the complex penal world required a special type of analysis. The level of examination, the terminology surrounding it, and the verbalizing of standards and tests mandated a holding limited to the set of facts presented:

> "[T]he arguments of the parties reflect the assumption that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary . . . for a narrower basis of decision is at hand." *Procunier v. Martinez,* supra. (42 USLW at 4610).

That "narrower basis", as the Government indicates (Brief at 13) was that the rights of non-prisoners were involved (i.e. those writing to the inmates). But is it fair to assume that "*A fortiorari*, the standard of review applied in the instant case can be no more stringent than that employed in *Martinez* . . . " (Appellant's brief at 14)?

Appellee posits that the *Martinez* standard is no different than that applied by the District Court below, i.e., "compelling interest". (A-191) Judge Weinstein's analysis of past "prison rights" cases, and more specifically, the "Black Muslim" cases, indicated that:

> "A pattern emerges in the Muslim food cases. Courts cite a strong "compelling" test, but apply it with lesser strength to prisoners' rights to take account of seriously disruptive administrative burdens. Put another way, the cases require the least denigration of the human spirit and mind consistent with needs of a structured correctional cosiety." (A-197-198).

The panoply of cases cited by Appellant in its brief (page 12, f.n.8) indicate a bewildering conglomeration of "magic words", all attempting to provide in "ten words or less" the test to end all tests. Yet what they all share is *essence*, and their differing verbiage is only a variation to ease application.

C.

WHEN APPLIED TO LEGITIMATE PENAL OBJECTIVES THE PROVIDING OF KOSHER FOOD IS FOUND NON-VIOLATIVE

The Government contends that "proper analysis demands primary consideration of a prisoner's interest in (1) security (2) discipline and (3) rehabilitation". (Appellant's Brief at 15)

Before proceeding further, appellee would take exception to the allegations of lack of *bona fides* as *implied* in Appellant's Brief (page 17). The Government has forwarded throughout

these proceedings, the theory that appellee could successfully sustain himself in prison whether Kosher food was provided or not. Nothing is further from the truth. The foods presently available that were (or might be) Kosher, e.g. tinned fish and fruits, would not provide a well-balanced died (see discussion infra).

1. *Security.* There has been no showing anywhere in these proceedings that the security of a federal penitentiary will be meaningfully breached by the importation of Kosher TV dinners for the handful of Orthodox Jewish prisoners involved.[8] Supplies from the outside world constantly pass in and out of the prison walls, and procedures have obviously been developed to cope with these large, almost daily movements of necessities. The fact that the individual dinners must, to preserve Kashruth, be opened by appellee himself (A-102-108) presents no problem, for this action could be done in front of a guard or other official who can then if he wishes, sift among the peas and carrots for automatic weapons. Moreover, these dinners will be coming from approved suppliers of the Bureau's choosing. If the Bureau is truly worried about "poisoning" (Appellant's Brief at 22), appellee would suggest that this event would be just as likely to occur, if at all, in the regular prison food as well. In fact, the fairly limited number of people who will handle the Kosher dinner makes detection of any potential assassin that much simpler. Logic and common sense suggest that, if anything, a Kosher TV dinner in an alluminum plate is not the "trojan horse" the Government attempts to frame it as, being "snuck" behind the enemy's walls to conquer him by surprise.

2. *Internal Order and Discipline.* Appellant is fond of relating the sad story of prisoner Rabbi Ron[9] (Appellant's Brief at 20) by

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8. Appellee has never proposed that Kosher food may *only* be provided via frozen TV dinners. TV dinners are an antiseptic, aesthetically less-than-adequate instrumentality. Appellee merely has suggested that, in view of the needs to lessen burdens, Kosher TV dinners would provide one of the least difficult means to satisfy the constitutional requirement.

9. Transfered to Ashland, Kentucky, after a short period of incarceration.

way of proof that providing Kosher food to the estimated 12 Orthodox Jewish prisoners in the federal system will undermine the discipline and order necessary to the rehabilitative process. Ron was a prisoner at West Street Detention Facility. Another prisoner, one Stuart Cohen, was being provided with Kosher TV dinners on an experimental basis. Predictably the experiment went forward without incident, and the ease with which Mr. Cohen's Kosher needs were met was testified to by Warden Gengler at the hearing below (A-117-119). When some of these dinners were supplied to Ron, some inmates resorted to violence to voice their resentment. This incident testified to by Warden Gengler in *U.S. v. Huss and Smilow* was the only one that Gengler could recall. Further, a fellow prisoner of Ron's testified at that same hearing, that *nobody* liked Ron and that the resentment against him was *not* attributable to his receiving Kosher food. Mr. Cohen testified that, in point of fact, his fellow inmates wondered why he was eating frozen TV dinners when he could have, instead, the pick of the food line.

Inquire: Which may be viewed as the greater of the two *vis-a-vis* "special treatment"? On the one hand we have a prisoner who eats with his fellow inmates and works at the same jobs they do, the only difference being that when he gets to the food line, he receives a frozen TV dinner, of limited quantity, instead of fresh food. On the other hand, view our prisoner under Policy Statement 7300.43B and the other concessions made to religious dietary observing prisoners. This prisoner works at a special job—the commissary. He gets to choose special items out of the medical line, and the regular food line, items including cakes and ice cream, fresh fruits and salads. Moreover, at meals end the leftovers are all his.—That is the Kosher ones— "Apples and oranges".

All appellee has asked for is to be treated with the same equality as his fellow prisoners. To be able to eat meals com-

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lost an extremely large number of pounds; became ill and has presently brought application for relief in the Southern District of New York.

mensurate with theirs. Appellee has not brought this suit "... because he is not satisfied with the dairy, juices, fruits and vegetables, etc. which would be available to him without suit" (Appellant's Brief at 17), but because a man cannot, and should not, be required to eat like a rabbit to ensure proper observance of his religion in America. It is *not* "obvious that the pre-packaged meals sought by appellee are totally unnecessary for his well-being" *Is.* What *is* obvious is that the Government is requiring appellee to choose between denial of self or denial of G-d. Americans have not yet enumerated this power as one which may be exercised by Government.

3. *Rehabilitation.* Perhaps providentially, Appellant has left this item out of the *Procunier v. Martinez* "checklist" of "substantial governmental interests" ("security, order and rehabilitation") (42 USLW at 4612). "[S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell v. Procunier,* supra, USLW at 4999 (15 Cr. L. 3203). When a man is an Orthodox Jew you cannot hope to rehabilitate him by forcing him to starve or eat non-Kosher foods. What you should seek to do is preserve in him all the decent and good characteristics which religion supports and foments.

4. *Bona Fides and Spurious Claims.* There is no real question to be determined in light of *bona fides.* We deal here with a faith almost 6,000 years old and far better known than the comparatively new Black Muslim faith which found support in *Barnett v. Rodgers.* After analyzing appellee's faith and its precepts the District Court found:

> "This brief discussion of theological and historical background obviously has some bearing on the issue of defendant's [appellee's] *bona fides.* He appears to be almost possessed with the problems of the Jews as a people. Such a dedicated Jew would feel that his own failure to obey God's commands as to Kashruth might constitute a breach of the covenant that might affect the

promised land and have grave consequences to himself." (A-176).

The Appellant fears that "spurious claims" will require the Bureau to make decisions as to *bona fides* which are "constitutionally distasteful" and "practically difficult" to determine. (Appellant's Brief at 23). The District Court suggested that the "repetitive and spartan" nature of the TV dinners would discourage a good number of charlatans. (A-201) For those that persisted, a showing would have to be made of "demonstrated adherence to, or belief in, Orthodox laws." *Id.* All of us are faced with difficult decisions which, because of responsibilities we undertake or duties with which we find ourselves burdened, become necessary to make. The importance of the decision, and not its ease or difficulty, is what matters. See *Theriault v. Carlson,* 339 F. Supp. 375 (M.D.Ga. 1974). To claim that "the challenged policy (7300.43B), of course, avoids all these problems while to a large degree accomodating almost all religion dietary practices" (Appellant's Brief at 23) is to beg the question. For if the policy was *truly* accomodating, there would be no issue before this Court.

5. *Financial Considerations.*

"It would be satisfactory to allow local or national Jewish Community groups to provide Kosher foods to Orthodox Jewish prisoners. Cf. *Kaufman v. Johnston,* 454 F.2d 264 (3rd Cir. 1972) (local community groups provided Kosher food to Jewish inmates of state prison; . . . " A199)

* * *

"While the cost of these dinners would be somewhat higher than regular prison fare, the government does not contest the fact that only a dozen persons would have to be provided with such food, so that costs would not be significant. It is also worth noting that the Bureau of Prisons *has traditionally had to provide numerous specialized diets* in the medical treatment facilities that are part of every prison." (A-200) (Emphasis Ours)

There has been no evidence presented that there exists any Bureau of Prison's policy against outside groups funding religious meals. In fact, this contact and closeness with community groups can only aid in the carrying out of the Bureau's mission.

6. *Alternative Means.* The nature of the problem and the complexities involved with Kashruth observance coupled with the ease of utilizing frozen, pre-packaged Kosher dinners, shows that appellant has not met its burden under *Sherbert* and *Martinez.* Rather, it has chosen "denial" instead of supplying fewer than 12 prisoners with Kosher food. The Bureau argues, in essence, that the best the United States Government can do under the circumstances are "tinned fish and fruit". The alternative in this case is reasonable and is being ignored.

D.

SUMMARY

The District Court viewed the situation as follows: that the Kashruth laws were critical to the Jewish faith; that incarceration in no way relieves the Jew from the observance of these laws; that the appellee was a strict adherent to the laws of Kashruth and would not break them till the point was reached at which he approached death; that the Bureau of Prisons refuses to provide appellee with adequate food which he is permitted to eat; and that there were no administrative difficulties extant to bar the provision of Kosher food. (A-169-170).

To this we add our discussion above: That appellee's religious practices are entitled to protection and an absence of Government intrusion; that, even as a prisoner, appellee was entitled to certain guarantees of freedom unless the Government could show some compelling interest which such provisions opposed; that there was no such affected interest and that, lastly, the Government had not chosen the least restrictive alternative possible.

Appellee suggests that under the Supreme Court's decisions in *Sherbert, Martinez* and *Pell,* and the manner in which the District Court applied those precepts to the facts of the case at bar, there was no error in holding that appellant is required to provide appellee with Kosher food.

POINT II

THE DISTRICT COURT EXERCISED PROPER JURISDICTION OVER APPELLEE'S CLAIM

A. *28 U.S.C. §1361.*

This Court noted in *U.S. v. Huss and Smilow,* supra at 5133, that federal districts had proper jurisdiction to consider claims by prisoners that their First Amendment rights were being violated pursuant to 28 U.S.C. §1361. Jurisdiction, of course, is predicated on proper venue under 28 USC 1391, as appellant points out. (Supplemental Brief at 4) Clearly, any reading of 1361 must include a determination as per 1391(e). *See Davis v. Federal Deposit Insurance Corp.,* 369 F.Supp. 277 (D. Colo., 1974).

28 USC §1391(e) reads as follows:

> "(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, a (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."

Not applicable to the case at bar are subsections (e)(1) or (e)(3), and the remainder of the discussion herein will deal with sections (e)(2) and (e)(4) of §1391.

1. §*1391*[*e*][*2*].

Common sense bolstered by case law suggests that when the denial of a right is the issue of litigation, that the proper place for that litigation to take place is where the cause of action—the injury or deprivation—took place. See *e.g. Jaynes v. Jaynes,* 496 F.2d 9 (2d Cir., 1974). In most cases a Court of this venue will be privy to the facts that occurred within the borders of its district and will be better able to adjudicate the issues involved than a district court detached by distance from the place of occurrence.

The court below, recognizing this requirement, noted that all the events surrounding appellee's claim took place in the Eastern District of New York and that, therefore, jurisdiction was properly assumed under 28 USC 1391(e)(2) (SA15-16):

> "[A]ll the major events in the case occurred in the Eastern District of New York. There is without a doubt, therefore . . . venue under 28 USC Section 1402, Subdivision (a); 1391, Subdivision (b); and *1391 Subdivision (e).*" (SA-16) (Emphasis supplied)

The Government argues that, while all the major events of the case did, indeed take place in the Eastern District, these "major events", however, had no bearing on the action at bar. (Supplemental Brief at 6).

Even peripheral examination will disclose that the initial, formal denial of Kosher food to the appellee was voiced before the court below, and that it is the order of the district court which even today keeps the appellee from starvation (SA21-22)

> "The major issue, as the Court sees it in the case is the religious sincerity of Mr. Kahane, because following the Court's reasoning, if he is in fact sincere about these matters he will be compelled to forego food to the point of serious danger to his life. This Court since it's (sic) observed the defendant in the criminal case, the Petitioner-Plaintiff in this case, on many occasions has held extensive hearings and has tried this issue, *it is*

clearly in the best position of any district court in the country to see the critical problem involved. If I were to transfer it to another court at this time, it would mean a duplication of all the work that this Court has done to date, and that would serve no purpose. It would mean that the case would not be heard until after the Petitioner-Plaintiff either was in a condition where he had to be released because of physical problems, or where he was released because his sentence was completed." (SA 16-17)

The District Court want to state its feeling that this Court heretofore remanded the matter to ensure that a proper case was eventually presented for adjudication, absent any judicial problems.

Clearly, therefore, venue was properly laid under 28 USC §1391(e)(2). No other district has ever been involved in this matter, and it would be dilatory and irreparably damaging to appellee if such were to be the case now.[10] "The law", the adage goes, "does not require useless acts". To duplicate the proceedings herein merely for a change of scenery is sheer foolishness.

2. *28 USC 1391(e) (4).*

When faced with a §1361 claim addressed to federal prison officials, a district court of proper venue may be one which sits in the district of the prisoner's residence prior to incarceration. *McCune v. U.S.*, 374 F. Supp. 946, 948 (SDNY, 1974).

The *McCune* case is directly in point. The prisoner was incarcerated at the time the action (which the court termed "cognizable under §1361", 374 F. Supp. at 948, fn. 2) was brought in Illinois. The action was brought in the Southern

10. While appellee remains incarcerated in the Southern District of New York, this is due to the fact that the Eastern District has no commensurate facilities where appellee can be released daily to secure Kosher food. We note, as did the court below, that appellant has always been free to transfer appellee where ever it felt was suitable. (SA21-22) Appellee remains where he is, in religiously protected conditions, pursuant to an order of the Court below.

District of New York. The district court, however, held that venue was improperly laid as prisoner had been a resident of the *Eastern* District of New York prior to his incarceration.

In point of fact, the only time, that has come to appellee's attention, in which a prisoner's *domicile* is of issue as to venue is when, in his complaint, the plaintiff has failed to state his residence, and the action is brought in a district other than the one in which the prison is located. See *Ellingsburg v. Connet,* 457 F.2d 240 (5th Cir. 1972); *Stone v. United States Board of Parole,* 360 F.Supp. 22 (D.Md., 1973) (also to the effect that prisoner's residence does not change to that of prison upon incarceration).

The court below ascertained that appellee's residence before incarceration was Brooklyn, and the appellant does not disagree. As Brooklyn is in the Eastern District of New York, even from the short discussion above, venue is obviously proper there (SA-25).[11]

3. *Summary.* The appellant has shown no reason why proper venue was not in the Eastern District of New York. Both 1391(e)(2) and (e)(4) are applicable. Since venue was proper, mandamus jurisdiction, pursuant to 28 USC §1361 was properly exercised.

B. *28 USC §2241.*

The habeas corpus proceeding, originally brought as 75-C-1343[12] (SA26) was begun at a time when the appellee was in the custody of a named party thereto, i.e., the United States

11. Even assuming, arguendo, that "domicile" need be shown, we would have serious problems with the Government's assertions thereupon. At all times, the appellee has been subject to the process of that court, and is presently incarcerated for violation of a probation imposed by it. Domicile cannot be acquired, *in futuro,* and until appellee is free to change his past domicile he cannot be said to have acquired a new one.

12. Later joined with 75-C-624, the matter currently before the Court (SA-44), and all the allegations in the complaint (SA26-32) were deemed incorporated herein. (SA 18, 44).

Marshal *in the Eastern District of New York.* It is worthwhile to note that process of the court extended to and enveloped the appellee and brought him *in custody* to the Eastern District.[13]

CONCLUSION

For all of the reasons outlined above, and on the basis of the record below, the order of the District Court should be affirmed.

Respectfully submitted,

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13. 28 U.S.C. 2241(5)(d) mandates "where in such person is in custody" for the purpose of Jurisdiction. (Cf. *Carapa v. Gurran,* 297 F. 946 2d Cir 1924).

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Sept. , 1975 deponent served the within Brief upon U.S. Atty., East Dist. of N.Y.

attonrye(s) for
Appellant

in this action, at
225 Cadman Plaza East
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
29 day of Sept. , 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976